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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1532

JOHN HECHINGER, *et al.*,
Appellants,

v.

DR. ROBERT MARTIN,
Chairman, District of Columbia Board of
Elections and Ethics, *et al.*,
Appellees,

FRANK H. RICH, JERRY A. MOORE, JR., and
DISTRICT OF COLUMBIA REPUBLICAN COMMITTEE,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OF INTERVENORS-APPELLEES

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Intervenors-Appellees hereby move that the judgment and decree of the District Court be summarily affirmed on the ground that the question raised is so insubstantial that no further argument is required.

QUESTION PRESENTED

The sole question presented by this appeal is whether the Constitution requires that a political party with a majority of registered voters must have the right in an election for a multi-member body to elect all the

members of that body. The District Court, following the decisions of every court to consider this issue, held that the Constitution contains no such requirement.

STATEMENT OF THE CASE

This case involves an attack by Appellants on the constitutionality of Sections 401(b)(2) and 401(d)(3) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, P.L. 93-198, 87 Stat. 744 (1973) ("the Act" or "the D.C. Self-Government Act"), which prohibit any single party from holding more than 85 percent of the seats on the District of Columbia City Council.[1]

The Appellants are the District's local Democratic Party, which as of March, 1975, registered 76.5 percent of the District's voters, and individual Democrats in the District of Columbia. Appellees-Intervenors are the only Republican member of the District Council; a registered independent voter in the District who ran unsuccessfully as an independent for a seat on the council; and the local Republican Party in the District.

The D.C. Self-Government Act, which allows citizens of the District their first experience in self government in many years, was passed by both houses of Congress and signed by the President in 1973. It was then submitted to the citizens of the District of Columbia for ratification and approved by 82.7 percent of the District's voters.

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[1]Although the appellants specifically direct their attack at these two sections of the Act, the Act contains no severability clause. The absence of a severability clause was intentional since such a clause was included in the original version of the bill (S. 1435) but was specifically deleted in conference. In effect, therefore, this appeal presents a challenge to the entire D.C. Self-Government Act.

The Act provides for the election of a Mayor to act as the executive of the District of Columbia, and of a council to act as the District's legislature. The council is made up of thirteen members. Eight are elected from the wards; five, including the chairperson, are elected at large. In order to ensure that the interests of political minorities would be represented on the council, Congress included Sections 401(b)(2) and 401(d)(3) in the Act. These sections, which are the subject of Appellants' attack, prohibit any party from nominating candidates for more than three of the five at large seats or a total of eleven of the thirteen seats on the council.[2]

In accordance with those provisions, the Democratic Party nominated eleven candidates for the thirteen city council seats to be filled in the November, 1974 election—the first election held under the Act. All eleven of the Democratic candidates were elected, along with one Republican and one member of the D.C. Statehood Party. The Democratic Party, therefore, now has 84.6 percent of the votes on and complete control of the city council.[3] The Appellants now claim that the minority representation provisions of the Act violate the Constitution. They claim that the Constitution requires that their party have the right to nominate and elect all the

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[2]These sections were a compromise proposed by Democrats in Congress in response to the proposal that elections for the District's council be held on a completely non-partisan basis. The Chairman of the House District Committee stated that the compromise "built into the partisan provision a protection of minority interests"—a protection he characterized as "fair and equitable." 119 Cong. Rec. H. 11509 (daily ed. Dec. 17, 1973) (remarks of Rep. Diggs).

[3]Under the Act, no issue requires more than a two-thirds majority of the council.

members of the city council even though their party represents only 76 percent of the voters.

ARGUMENT

I.

THE PRECISE CLAIMS MADE BY THE APPELLANTS HERE HAVE BEEN UNIFORMLY AND CONSISTENTLY REJECTED BY THE COURTS.

Sections 401(b)(2) and 401(d)(3) of the D.C. Self-Government Act were carefully designed by Congress to ensure that the approximately 24 percent of the District's citizens who are not members of the majority party would not be completely excluded from a voice in the city council. The provisions Congress adopted to accomplish that purpose, which provide only minimal representation to minorities, are both reasonable and constitutional.

As the court below held:

> "We think that the Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capitol is a valid one . . . and that the means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgement of [constitutional] rights.
>
> "But for the restriction of the challenged sections the majority party (Democratic at present) would be able to elect all of its candidates to the council, thus leaving a minority without any input into council activity. The concept of minority representation, or stated in another fashion, limitations on majority representation, is entirely consistent with First Amendment principles of freedom of expression and association, and appears altogether legitimate as a legislative objective." (J.S. at 5 a.)

That decision by the District Court was in accord with the decisions of every court which has considered this issue. Just recently, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court reaffirmed the principle that achieving a balance between political parties reasonably consistent with their voting strength is a legitimate legislative objective. In that case, a bipartisan board in Connecticut drawing voting district boundaries departed somewhat from absolute population equality in order to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752. The Court rejected a challenge to that plan in terms which are directly relevant here:

> "The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. . . .
>
> ". . . [J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. . . . [N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S. at 753-54.

The Appellants argue that *Gaffney* is inapplicable because it is an apportionment case. But the policy considerations articulated in that case certainly apply here. And, in any event, the courts have considered, and consistently rejected, constitutional challenges to minor-

ity representation statutes virtually identical to the one at issue here.

Blaikie v. Power, 13 N.Y.2d 134, 193 N.E.2d 55 (1963), *appeal dismissed for want of a substantial federal question,* 375 U.S. 439 (1964), involved an attack on a provision of the New York City charter designed—as was the statute at issue here—to assure some minority representation on the city council. The New York council consists, in addition to a single member elected from each ward in the city, of ten at-large members, two elected from each of the five city boroughs. In order to ensure the representation of minority interests on the council, the New York charter prohibited any party from nominating more than one candidate for councilman at large in each borough. In addition, and beyond the statute challenged in this case, the New York provision allows each elector to vote for only a single borough-wide candidate. The court rejected a claim that the New York plan violated the Constitution:

> ". . . [The] system necessarily involves a limitation of voting, imposed on all voters alike, in order to make possible of achievement some minority representation in a multiple body. . . .
>
> "The repeated efforts of New York City extending over the last century, to provide some form of minority representation in the machinery of local government is evidence of the widespread feeling that such representation can play an important role in a democracy. Indeed, . . . it [is] 'an attempt to make representative government a reality.'" 193 N.E.2d at 59.

In *LoFrisco v. Schaffer,* 341 F. Supp. 743 (D.Conn.), *aff'd per curiam,* 401 U.S. 972 (1972), the plaintiff, a registered Republican voter, challenged a Connecticut

minority representation statute also limiting the number of candidates any party could nominate—in that case, for the local boards of education. Unlike the provisions challenged here, the Connecticut statute also limited the number of board vacancies for which any elector could vote. A unanimous three-judge district court held that the purpose underlying the statute—"to have a significant minority voice, to air and introduce ideas which the majority might not otherwise consider . . . to assure intelligent decision-making"—was entirely constitutional and more than justified any dilution of the majority party's power. 341 F. Supp. at 750.

Again, in *Kaelin v. Warden,* 334 F. Supp. 602 (E.D. Pa. 1971), a three-judge court rejected a constitutional attack on the Pennsylvania minority representation statute which limited each elector to vote for no more than two county council candidates for the three vacancies to be filled each election:

> "Nothing in the Constitution militates against a scheme which is designed to encourage some minority representation. . . .
>
> "The statute may be viewed as having an effect which encourages a fairer or more effective representation than would otherwise result if a simple plurality rule were used in which the majority elects all the commissioners, for this would necessarily discriminate by entirely discounting the votes of the minority electors." 334 F. Supp. at 605.

And, in *People v. Carpentier,* 30 Ill. 2d 590, 198 N.E.2d 514 (1964), the court rejected a challenge to the Illinois minority representation statute which limited each party to nominate no more than 118 of the 177 at-large spots to be filled in the Illinois House of Representatives:

> ". . .[M]inority representation in the House is a principle firmly entrenched in the democratic traditions and ideologies of this State." 198 N.E.2d at 517.

In short, the courts, without exception, have held that minority representation statutes almost identical to the one enacted by Congress for the District of Columbia, and indeed going beyond it, are not only constitutionally permissible but are a wise and beneficial exercise of the legislative power.

II.

THE STATUTE IS NOT DISCRIMINATORY.

The Appellants make a single attempt to distinquish the minority representation provisions involved here from those consistently upheld in other cases. The Appellants contend that the D.C. Act creates an invidious discrimination in favor of independents by permitting independent candidates to run for all thirteen seats on the city council.[4] There is, however, no discrimination here, invidious or otherwise. The Appellants simply misunderstand the nature of "independents" in the District of Columbia.

The purpose of the challenged minority representation provisions is to prevent the candidates of a single party from capturing more than eleven of the thirteen seats on

[4]The Appellants also suggest in their Jurisdictional Statement that a minority representation statute might violate the Constitution if it were designed to fence out racial minorities. We do not disagree. But there has never been any suggestion that the minority representation provision here either was racially motivated or has had a racial impact. Indeed, all but one of the persons elected to the D.C. City Council are members of a racial minority, and the one white member on the council is a Democrat.

the city council. Those provisions apply equally to every political party—a term which is defined in the D.C. Code to cover any organization which is capable of capturing more than a single seat on the council. *See* 1 D.C. Code 1121(j).

"Independent" is not a party or organizational label in the District of Columbia. Independent candidates in the District are independent both from the political parties and from each other. Each independent candidate stands for election individually and for a single seat only. Thus, as the District Court pointed out: the "danger [of an "organization" or "party" capturing all the council's seats] does not exist, by definition, with independent candidates, since they are not related organizationally to any other candidates running." (J.S. at 10 a.)

CONCLUSION

For the foregoing reasons, it is apparent that this appeal presents no substantial issue and this Court should, therefore, summarily affirm the decision below.

Respectfully submitted,

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